

1 Paul W. Ahler
2 Executive Director
3 Sate Bar # 005379
4 Arizona Prosecuting Attorneys' Advisory Council
5 3001 W. Indian School Rd., Suite 307
6 Phoenix, Arizona 85017

7 IN THE SUPREME COURT OF THE STATE OF ARIZONA

8 In the Matter of:)	SUPREME COURT
)	Case No.: R-08-0027
9 PETITION TO ADD RULE 57.1 AND)	
10 RULE 57.2, ARIZONA RULES OF CIVIL)	COMMENT TO PETITION TO ADD
11 PROCEDURE)	RULE 57.1 AND RULE 57.2, ARIZONA
)	RULES OF CIVIL PROCEDURE
)	
)	
)	

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13 The Arizona Prosecuting Attorneys' Advisory Council , APAAC, submits the following
14 Comment to the Petition to Add Rules 57.1 and 57.2 to the Arizona Rules of Civil Procedure.
15 APAAC generally agrees with the Petition to add Rule 57.1, but believes that the rule should
16 include a provision allowing the judicial officer in a criminal case to make a finding of factual
17 innocence after a defendant has pleaded guilty to, or been found guilty of, an identity theft crime
18 against an innocent person. APAAC has no comment on Proposed Rule 57.2.

19 **A. Statutory History and Summary of the Proposed Rules**

20 The Arizona Legislature has enacted A.R.S. §§ 12-771 and 12-772, effective January 2,
21 2009, establishing a procedure for seeking and obtaining a judicial determination of "factual
22 innocence." A.R.S. § 12-771(A) states that a person, or a prosecuting agency on his or her
23 behalf, may petition for such a judicial determination if the person's name was used by someone
24 else who was arrested, cited, or charged with a criminal offense or had the person's name entered
25 as of record in a judgment of guilt in a criminal case. § 12-771(B) requires the petition to be
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1 filed in the Superior Court in which the arrest was made, the citation was issued, or the charge
2 was filed. The statute does not specify, however, whether the petition must be filed in a civil
3 division or a criminal division of the court.

4 The proposed Rules of Civil Procedure are designed to implement these judicial
5 determinations of factual innocence. Proposed Rule 57.1(A) basically tracks the language of
6 A.R.S. § 12-771(A). Subsection (B) of the proposed rule states that the petition for a judicial
7 determination shall be assigned a civil case number. The burden of proof for such a
8 determination is by clear and convincing evidence.

10 **B. Comments on Proposed Rule 57.1**

11 APAAC notes that A.R.S. § 12-771(A) states that a person “may petition the Superior
12 Court for a judicial determination of the person’s factual innocence.” Proposed Rule 57.1(A)
13 refers to the statute, A.R.S. § 12-771. Subsection (B) of proposed Rule 57.1, adds the new non-
14 statutory requirement that a petition filed under A.R.S. § 12-771 be “assigned a civil case
15 number.” This means that such a petition would always be handled as an independent civil
16 matter, even if a judgment of guilt has been entered in a criminal case on the identity theft matter
17 and even if a prosecuting agency files the petition on the person’s behalf. This would lead to
18 unnecessary duplication of proceedings and would waste judicial resources and cause
19 inconvenience for the persons involved including victims who may be required to pay a civil
20 filing fee.

22 APAAC believes that if a defendant has pleaded guilty or has been found guilty after
23 trial, it would be appropriate to allow the Superior Court judge in a criminal case to make a
24 finding of “factual innocence” after a finding of guilt in addition to the alternative of filing a civil
25 petition. Victims must take time out of their regular schedules to appear for court hearings that
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1 may be delayed or rescheduled due to circumstances beyond their control. It follows that
2 victims' rights are best served when proceedings are not unnecessarily multiplied. In addition,
3 most criminal defendants enter guilty pleas early in the proceedings. Most identity theft victims
4 would want the court to make the earliest possible determination of their factual innocence.

5 APAAC takes no position on Proposed Rule 57.2.

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8 Respectfully submitted this 14 of May, 2009.

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11 Paul W. Ahler
12 Executive Director
Arizona Prosecuting Attorneys' Advisory Council

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14 Copies of the foregoing have
15 been electronically filed
this 14 day of May, 2009 with:

16 Arizona Supreme Court

17 Copies of the foregoing have been mailed
18 This 14 day of May, 2009 to:

19 David K. Byers, Director
20 Administrative Office of the Courts
1501 W. Washington St.
Phoenix, Arizona 85007
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